IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 30, 2008 Session

STATE OF TENNESSEE v. PHILLIP CORY REEP

Appeal from the Criminal Court for Knox County
No. 81415B Richard R. Baumgartner, Judge

No. E2007-00619-CCA-R3-CD - Filed June 23, 2008

In March 2005, a Knox County grand jury indicted the defendant, Phillip Cory Reep, on two counts of aggravated child abuse, a Class A felony, two counts of child abuse, a Class D felony, and one count of possession of drug paraphernalia, a Class A misdemeanor. Following a January 2007 jury trial in Knox County Criminal Court, the defendant was acquitted of the two aggravated child abuse charges and convicted of two counts of the lesser-included offense of reckless endangerment, a Class A misdemeanor. The defendant was also convicted on the other three counts of the indictment. The defendant sought a sentence of judicial diversion or, in the alternative, full probation, but following a sentencing hearing, the trial court denied these requests and sentenced the defendant to four years in the Department of Correction as a Range I, standard offender. On appeal, the defendant argues that the trial court erred by denying the defendant's application for judicial diversion and full probation. After reviewing the record, we affirm the trial court's denial of alternative sentencing. However, because the trial court violated the defendant's Sixth Amendment rights by enhancing his sentence based on enhancement factors that were not found by the jury beyond a reasonable doubt, we remand the case to the trial court for resentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part, Reversed in Part; Case Remanded for Resentencing.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and NORMA MCGEE OGLE, JJ. joined.

Russell T. Greene, Knoxville, Tennessee, for the appellant, Phillip Cory Reep.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; James D. Holley, Jr. and Charme J. Knight, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

At trial, W.A.[1] testified that prior to the defendant's arrest, he lived with his mother, Stephanie Allen,[2] the defendant, and his (W.A.'s) younger siblings: two brothers, L.A., age four, and B.A., who was just over a year old, and a sister, A.A., age three. W.A. said he was five years old at the time of the incidents leading to this case and seven years old at the time of trial. He said that since these events, he had been adopted and lived with his adoptive parents in Silverdale, Washington.

W.A. testified that when he first met the defendant, he was a nice person. He said that the defendant eventually moved in with Allen and her children, and after a while, the six of them moved to a different residence. W.A. testified that on one occasion, the defendant bit him below the left shoulder, and on another occasion the defendant choked him and slammed his head onto the floor. W.A. said he never saw the defendant abuse his siblings, but he did observe things from which he could intuit that the defendant was committing abuse. W.A. testified that on one occasion, he saw A.A. with a black eye and a week later he saw his sister with another black eye. He also observed L.A. with a knot on his head. W.A. testified that he "either heard [L.A.] or [A.A.] screaming, or I heard something that sounded like smacking or something like that." He also recalled hearing A.A. screaming "when [the defendant] burn[ed] [A.A.] on her bottom." W.A. also recalled an occasion when L.A. used the bathroom and he then heard his brother screaming, which led W.A. to believe that the defendant placed L.A.'s head in the toilet. Finally, he recalled a time when he heard the defendant putting B.A. to bed; W.A. heard B.A. crying, and he then heard "a loud smack noise."

W.A. testified that he was unsure of Allen's whereabouts during these episodes, although he did recall that during the episode where he heard B.A. crying and then a smacking noise, Allen was in A.A.'s bedroom reading her a story. On cross-examination, W.A. testified that when his siblings were younger, he would often feed them and change their diapers because Allen was asleep. He also said that he was unaware of Allen ever knocking A.A. down the stairs. W.A. testified that Allen did not see these incidents of abuse because the defendant "only did it when she wasn't around."

Officer Mark Kennedy with the Knox County Sheriff's Department testified that he responded to a domestic disturbance call at a Knox County residence on January 23, 2005. He said that he and fellow deputy Bobby Law, who arrived separately at the residence, knocked on the door and were greeted by Allen. The two deputies then entered the residence. Officer Kennedy located the defendant in a bathroom; the defendant said he was in the bathroom because "he was afraid he was going to get into trouble." Officer Kennedy observed a spoon with what appeared to be narcotics residue on it, and he also observed track marks on the defendant's arm.

Officer Kennedy testified that he also saw the four children in the house. He said that the "first thing that I noticed was the youngest child [B.A.] with a large . . . softball-size[d] knot on the

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[1] The four victims, all children, will be referred to by their initials.

[2] Allen, the mother of the four victims, was indicted as a co-defendant but absconded and was not present for this trial. She was ultimately apprehended and later pled guilty to four counts of child neglect. In April 2008, she was sentenced to seven years in the Department of Correction.

side of the baby's head." At that point, the deputies contacted Rural/Metro, who sent over an ambulance. He also observed the children with several bruises, burn marks, and possibly a bite mark.

Officer Law testified that when he arrived at the house, he interviewed Allen, and he then went through the house to check on the children. He said that when he saw A.A., it was immediately apparent that she had a "large lump" on the left side of her head. He also testified that W.A. had a bite mark on his shoulder and bruises about his head. Officer Law said he spoke with W.A., and W.A. said that the defendant had bitten him and placed his foot on his head, thus causing the bruises on W.A.'s head.

Two detectives with the Knox County Sheriff's Department who arrived at the scene after Deputies Kennedy and Law began their investigation also testified. Detective Jeanette Harris said that she observed B.A. with a knot on his forehead and two black eyes. She also said that when someone was changing B.A.'s diaper, he saw that the child's bottom "was very raw and irritated." Detective Harris also noted that the child had a bruise on his right leg, a scratch and bruises on his back, and a bruise near his mouth. She testified that A.A. had "a huge knot on her forehead that was blue, and it was protruding from her head." She also said that the girl had a black eye and another knot on the back of her head. Detective Harris testified that she did not observe any injuries on the other children. Detective Roberta Roberts testified that she and Department of Children's Services (DCS) investigator Terri Wiggins interviewed W.A., who told them that the defendant had bitten and choked him.

Richard Lindfors, a paramedic with Rural/Metro, testified that he responded to the call at the residence shared by Allen and the defendant. Lindfors testified that he treated A.A. and B.A. He noticed that A.A. had "what looked like a bruise on the side of her head," and that this bruise was very large. Lindfors said that as he was treating the girl's injuries, she said that her bottom hurt. Lindfors and the other paramedics, responding to this complaint, removed the girl's diaper and saw what appeared to be second-degree burns on her buttocks and the back of her legs. Lindfors also said that he observed bruising on B.A.'s forehead, as well as a mark on his back. Lindfors said that he had no trouble seeing these injuries.

Dr. Marymer Perales testified that she examined the four children when they were brought to East Tennessee Children's Hospital in Knoxville following the defendant's arrest. Dr. Perales said that B.A., who was thirteen months old at the time she examined him, had several bruises on his back. Dr. Perales said that given the locations and multiplicity of B.A.'s injuries, the injuries were not consistent with accidental trauma; rather, the injuries appeared to be "nonaccidental inflicted trauma." The physician said that this assessment also applied to the injuries to the other three children.

Dr. Perales said that A.A., who was just over three years old at the time of her exam, had more injuries than the other children. The physician observed scabs on A.A.'s scalp and bruises on her head. Dr. Perales interviewed W.A., who told her that the defendant pulled A.A.'s hair. Dr. Perales opined that A.A.'s injuries were consistent with her hair being pulled. Dr. Perales also noted that A.A. had first and second-degree burns on her buttocks, thighs, and genitals. W.A. informed

Dr. Perales that he once saw the defendant boil water and take it to the bathroom, and he then heard A.A. scream. Dr. Perales testified that A.A.'s burns were consistent with being placed into hot water or having hot water poured into a place where she was sitting.

Dr. Perales said that L.A. and W.A. exhibited bruises on their necks. W.A. said that the defendant had strangled the children after Allen had made him mad, and Dr. Perales opined that the bruising was consistent with being strangled. Dr. Perales also observed a bite mark on W.A., although she could not determine whether the bite had been made by a human or an animal. On cross-examination, Dr. Perales said that A.A.'s burns could have been accidentally inflicted. She also noted that L.A. did not appear to have bruising in the photos that were taken during the exam and introduced into evidence at trial. However, Dr. Perales insisted that L.A. did have bruises, but that this type of bruising did not show up well in photographs

April Lynn Fox, Allen's former roommate, testified for the defendant that she lived with Allen and Allen's four children between August 2004 and October 2004. She said that during this time, Allen did not do much with her children and that Fox and Allen would go out "[a]bout five nights a week." Fox recalled that Allen met the defendant in early to mid-September 2004 and that he moved in shortly thereafter. Fox said that the children were "uncontrollable," meaning that they lacked discipline and did not listen to instructions. She said that the children's behavior did not change once the defendant moved in. Fox said that while Allen often got angry at the children, Fox "never [saw] her hit them to where she would leave a mark."

Fox's mother, Teresa Miller, testified that she visited her daughter at her residence during the time she lived with Allen. Miller said that the home "was not a very good atmosphere" for the children, and she also testified that she saw bruises and other marks, possibly bite marks, on the children. She also recalled that the children were often "filthy" and needed their diapers changed. Miller also noted that the residence "was in disarray" and that often there was no food for the children. Miller said that once the defendant moved in with Allen, he helped Fox take care of the children, feeding and bathing them. Miller also observed Allen with a book containing various names and Social Security numbers, presumably of former roommates and paramours. Miller said that the day she helped her daughter move out of Allen's residence, she told the defendant to leave Allen for his own good. The defendant told Miller that he was leaving and even packed his belongings, but he did not leave Allen that day.

Miller said that she called DCS on three occasions to complain about the home. She initially called the Anderson County DCS office, which referred her to the toll-free central intake number for reporting child abuse allegations. She said she called this number and reported her concerns regarding the Allen residence. After the first referral, she called central intake again to inquire about the progress of the investigation; Miller claimed she was told that DCS had investigated and found no problems with the home. She testified that she made two later referrals, expressing concern over what she perceived to be continuing problems at the home. On cross-examination, Miller admitted that she did not recall the specific dates on which she contacted DCS, she did not provide her name to central intake, and she did not record the names of the DCS workers with whom she spoke.

The defendant testified that he met Allen in August 2004 at a Knoxville nightclub. He said that by mid-September 2004, he moved in with Allen, Fox, and Allen's four children. The defendant testified that initially Allen was a "great girl," but her demeanor changed when she stopped taking her prescribed medications, Zyprexa and lithium, and she began abusing Adderall and OxyContin. The defendant said that Allen soon became "very agitated, and she was angry at everyone and everything for just no reason." He also said that Allen became verbally and physically abusive with her children and with him. The defendant testified that when Allen's mood changed, he and Fox took care of the children until Fox moved out in mid-October. He also testified that W.A. helped take care of the younger children as well. The defendant testified that as Fox was moving out, Fox's mother advised him to move out of the residence, and he did pack his belongings that day, but he did not leave Allen and the children. The defendant admitted that he also began abusing hydrocodone and OxyContin as a means of coping with his cousin's suicide.

The defendant said that he occasionally saw Allen dragging the children by their arms and grabbing and shaking them by their faces. He testified that on Christmas day, he saw Allen drag A.A. by her arm to the stairs. The defendant said that after Allen got A.A. to the stairs, she "heaved" the girl down the stairs. He said that after this incident, he left Allen and spent a few days with his mother and stepfather before returning to Allen. He said that he stayed with Allen until January 3, 2005, when he contacted the Knox County Sheriff's Department, complaining that Allen stole some of his money. When the police arrived, the defendant told the investigating officer about the stair-throwing incident and commented that the police "might need to look into this because she's abusing her children." At that point, the defendant again left Allen and stayed with a friend.

At some point during the defendant's time away, Allen called him. The defendant said that Allen "apologized for stealing my money and said she wanted to explain herself and everything." The defendant later met with Allen, who in the defendant's view "seemed just like the person that I'd originally met and cared for. She seemed like she was back on her meds and she told me she was." The defendant also knew that Allen had been evicted from her previous residence for not paying rent, so he gave Allen money to rent a house in Knox County. At that point, the defendant returned to Allen, and they and Allen's children moved into the house where the defendant and Allen were ultimately arrested.

The defendant testified that shortly after he and Allen moved into the new house, Allen again stopped taking her prescribed medications. The defendant said that Allen once again became "[a]gitated, angry at everyone, angry at the world, and at this point she's still being mean to her kids, and then some days she'd just sleep." He said that on the Friday before he and Allen were arrested, he heard a loud scream coming from the back of the house. When he went to investigate, he discovered Allen holding A.A., who was still screaming and crying. Allen said that she had forgotten to turn on the cold water in the bathtub. The defendant said that he did not notice anything wrong with the girl because he only saw her with clothes on during the next few days.

The defendant testified that Sunday, January 23, began with him and Allen getting into an argument. The defendant told Allen that he was leaving, and he began to pack his belongings. At that point, according to the defendant, Allen told him that she would call the police. She then began a pattern of dialing 911 on her cellular phone in front of the defendant, making sure the defendant

saw her press the "send," button, hanging up a few seconds after the call connected, then dialing 911 again. The defendant said that as he was about to leave the residence, Allen informed him that the police had arrived. After a while, the police arrested the defendant and Allen.

On cross-examination, the defendant said that he did not call the police or DCS to report the Christmas day episode involving Allen and A.A. He said that he wanted to take A.A. to the hospital, but Allen convinced him not to do so. He admitted that he did not say anything about Allen abusing the children until the police arrived to investigate his claims that Allen was stealing his money. He also said that in the two days following the incident in which A.A. was burned, he did not notice anything that would have convinced him that the girl was in pain.

Terri Wiggins, a Child Protective Services (CPS) investigator with DCS, testified as a rebuttal witness for the state. She testified that in September 2003, the New York Office of Children and Family Services made a referral to DCS. Wiggins said that a referral had been made against Allen in New York for lack of supervision, and because Allen had left New York for Tennessee, the New York agency was unable to investigate the allegation. Therefore, the New York agency asked DCS to perform a home study on Allen. DCS performed the home study and investigated Allen for lack of supervision; at the conclusion of the investigation, DCS concluded that the allegations were unfounded and both states concluded their investigations. Wiggins also testified that all DCS activity regarding children is recorded in the agency's central computer database, TNKids. Wiggins said that her review of TNKids revealed that the investigation related to the New York referral was the only activity regarding Allen and her children in the database. In other words, DCS recorded no other allegations of abuse regarding the family between the New York referral and the time of the defendant's arrest.

After hearing the proof, the jury acquitted the defendant of two counts of aggravated child abuse (relating to A.A. and B.A.) and convicted him of two counts of the lesser included offense of reckless endangerment. The jury convicted the defendant of two counts of child abuse (relating to W.A. and L.A.) and one count of possession of drug paraphernalia. Following a sentencing hearing, the trial court denied the defendant's requests for judicial diversion and full probation and sentenced the defendant to four years in the Department of Correction. This appeal followed.

ANALYSIS

Denial of Judicial Diversion

The defendant contends that the trial court erred in denying judicial diversion. The state argues that the trial court appropriately denied diversion based upon the circumstances of the offenses committed by the defendant. The defendant argues that the "positive factors" for granting the defendant diversion far outweighed the negative ones, and therefore the trial court abused its discretion by denying the defendant's request for judicial diversion.

Pursuant to Tennessee Code Annotated section 40-35-313(a)(1)(B), a defendant is eligible for judicial diversion when convicted of a Class C, D or E felony and has not been previously convicted of a felony or a Class A misdemeanor. The decision to grant judicial diversion lies within the discretion of the trial court and will not be disturbed on appeal unless it is shown that the trial court abused its discretion. State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). A denial of judicial diversion will not be overturned if the record contains any substantial evidence to support the trial court's action. Id. (citations omitted).

When making a determination regarding judicial diversion, the trial court must consider the following factors: (1) the defendant's amenability to correction, (2) the circumstances of the offense, (3) the defendant's criminal record, (4) the defendant's social history, (5) the defendant's mental and physical health and (6) the deterrent effect of the sentencing decision to both the defendant and other similarly situated defendants. State v. Lewis, 978 S.W.2d 558, 566 (Tenn. Crim. App. 1997) (citations omitted). The decision should be based on whether the grant of diversion will serve the ends of justice for both the public and the defendant. Id. The record must reflect that the trial court considered and weighed all these factors in arriving at its decision. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). The seriousness of the offense itself may justify a denial of diversion provided the trial court considers all other relevant factors and concludes that the seriousness of the offense outweighs all other factors. State v. Curry, 988 S.W.2d 153, 158 (Tenn. 1999) (citing State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993)).

In considering the factors outlined in Lewis, the trial court noted that the defendant had no prior criminal record and was in good physical and mental health. However, the trial court concluded that the other factors preponderated against granting judicial diversion. The trial court noted that the defendant's amenability to correction appeared low based on his reluctance to take responsibility for his actions. In support of this conclusion, the trial court pointed to trial testimony in which the defendant was said to be hiding in the bathroom when the police arrived. The trial court also commented on the defendant's MySpace.com page, a screen capture of which was introduced into evidence at the sentencing hearing:

> [W]hat particularly struck me is in bold letters on the top of this, on one entry is, "Not guilty. Thanks to everyone who stood behind me through all the bulls— I have been going through," and then again he, in bold letters, puts "not guilty."
>
> Well, apparently, Mr. Reep, you were sitting in a different courtroom than I was when this jury returned the verdict, because they found you guilty of reckless endangerment with regard to two of these children and child abuse of two of these children. . . . So you were not by any means found not guilty of anything.

The trial court also found that the defendant's social history was poor based on his history of illicit drug use and his "at best spotty" work record during the period before these events took place. Regarding the "deterrent effect" factor, the trial court stated that "it would not serve the end[s] of justice to place [the defendant], or anyone similarly situated to [him], on judicial diversion. . . . [T]his would be an absolutely terrible message to send that you can be convicted of being involved in this kind of activity and then be given diversion."

The trial court gave the most weight to the "seriousness of the offense" factor. The trial court noted, "[T]his is an egregious case of child abuse visited on four individuals that went on for a substantial period of time, and is still having an impact on these children." The trial court's assessment was supported by the evidence produced at trial. W.A. testified that the defendant choked him, bit him, and slammed his head against the ground, and a paramedic and several police officers testified that A.A. and B.A. had noticeable bumps on their heads. Dr. Perales testified that A.A. had severe burns on her thighs, buttocks, and genitals, she said that the other children had several bruises, and she opined that these injuries were intentionally inflicted. Given the substantial evidence in support of this and other factors that preponderated in the state's favor, we conclude that the trial court properly denied the defendant's request for judicial diversion. The defendant is denied relief on this issue.

Denial of Full Probation

As a final allegation of error, the defendant argues that the trial court erred in denying him full probation. The trial court denied full probation based upon its finding that full probation would "depreciate the seriousness of the offense." The state contends that the trial court appropriately denied full probation based upon this factor.

The principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. See Tenn. Code Ann. § 40-35-103(2), (4) (2003). Accordingly, our sentencing act provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Id. § 40-35-102(6); see also State v. Fields, 40 S.W.3d 435, 440 (Tenn. 2001). The following considerations provide guidance regarding what constitutes "evidence to the contrary" that would rebut the presumption of alternative sentencing:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Tenn. Code Ann. § 40-35-103(1); see also State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000). When the "seriousness of the offense" factor forms the basis for denying alternative sentencing, "'the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an exaggerated degree,' and the nature of the offense must outweigh all factors favoring a sentence other than confinement." State v. Grissom, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997) (citations omitted).

In determining whether to grant probation, the court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the deterrent effect on the defendant; and the defendant's potential for rehabilitation or treatment. See Tenn. Code Ann. § 40-35-103.

Because the defendant was convicted of a Class D felony, he is entitled to the presumption that he is a favorable candidate for alternative sentencing. See Id. § 40-35-102(6). We note, however, that "[t]he determination of whether the appellant is entitled to an alternative sentence and whether the appellant is entitled to full probation are different inquiries." State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Where a defendant is entitled to the statutory presumption of alternative sentencing, the state has the burden of overcoming the presumption with evidence to the contrary. State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), overruled on other grounds by Hooper, 29 S.W.3d at 9-10. Conversely, the defendant has the burden of establishing his or her suitability for full probation, even if the defendant is entitled to the statutory presumption of alternative sentencing. Id.; see Boggs, 932 S.W.2d at 477. No criminal defendant is automatically entitled to probation as a matter of law. State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would "subserve the ends of justice and the best interests of both the public and the defendant." State v. Souder, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002) (citations omitted).

In this case, the trial court denied the defendant's request for probation to avoid depreciating the seriousness of the defendant's offenses. The trial court specifically stated that "these offenses are horrifying, they're shocking, they're reprehensible and of an excessive [nature]— when you look at . . . all of the testimony with regard to the various injuries suffered by these children, I think that they are excessive [and] of an exaggerated degree." Furthermore, as stated above, in denying the defendant judicial diversion the trial court found that the defendant's potential for rehabilitation was low based on his refusal to accept responsibility for his actions, that the defendant had a poor social history based on his history of illegal drug use and his "spotty" work record, and that alternative sentencing would not serve the ends of justice. Concluding that the record fully supports the trial court's denial of full probation, we deny the defendant relief on this issue.

Length of Sentence

Although not raised by either party, we must consider whether the four-year sentence imposed by the trial court was proper. In this case, the state proposed the following enhancement factors for the defendant's sentences for his felony child abuse convictions:

> (4) The offense involved more than one (1) victim;
> (5) A victim of the offense was particularly vulnerable because of age or physical or mental disability. . . ;
> (6) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense; and

> (16) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense.

Tenn. Code Ann. § 40-35-114(4)-(6), (16) (2003). The trial court did not apply factor (4), noting that the defendant "faced jeopardy with regard to each individual [victim]," but it found that the other three enhancement factors applied, giving factors (5) and (16) considerable weight. Based on these enhancement factors and the absence of mitigating factors, the trial court sentenced the defendant to four years in the Department of Correction on each count, the maximum sentence for a defendant convicted of a Class D felony as a Range I, standard offender. See Id. § 40-35-112(a)(4). The trial court ordered the sentences to run concurrently.

Initially, we note that the defendant was arrested in January 2005. Accordingly, although the defendant was not tried until January 2007, after the July 2005 enactment of Tennessee's revised sentencing act, the defendant would have been sentenced according to the sentencing guidelines effective at the time of his arrest unless he waived his ex post facto rights. See 2005 Tenn. Pub. Act ch. 353, § 18. No such waiver appears in the record. Therefore, we conclude that the trial court's application of the revised sentencing act in this case was improper, and we will review the defendant's sentence pursuant to the former act.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2003). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

Under the law as it existed before the 2005 amendment, unless enhancement factors were present, the presumptive sentence to be imposed was the minimum in the range for a Class D felony. Tenn. Code Ann. § 40-35-210(c) (2003). Tennessee's pre-2005 sentencing act provided that, procedurally, the trial court was to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Id. at (d), (e). However, the Tennessee Supreme Court recently held that the trial court's enhancement of a defendant's sentence based on factors that had not been found by a jury beyond a reasonable doubt violated a defendant's Sixth Amendment right to a jury trial as interpreted by the Supreme Court. State v. Gomez, 239 S.W.3d 733, 740 (Tenn. 2007) ("Gomez II") (citing Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856, 860 (2007)); See also Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)) ("'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"). Accordingly, we conclude that the trial court's application of enhancement factors to the

defendant's sentence was improper, and we therefore remand this case to the trial court for a new sentencing hearing.

CONCLUSION

In consideration of the foregoing and the record as a whole, we affirm the trial court's denial of alternative sentencing. Based on the Gomez II and Blakely violations, the matter is remanded to the trial court for a new sentencing hearing.

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D. KELLY THOMAS, JR., JUDGE